SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 589

WENDELL EVANS, *Petitioner*

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, Wendell Evans, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit in the above-entitled case on May 11, 1966.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is as yet unreported; it is printed herein as Appendix C.

JURISDICTION

The decision and judgment of the Court of Appeals for the Fourth Circuit was entered on May 11, 1966. (App. C-1) A timely petition for rehearing *en banc* was denied June 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix D.

QUESTION PRESENTED

Whether, in a diversity case, a federal district court affirmed by a circuit court of appeals, may properly grant summary judgment where:

(1) There are direct conflicts in the pleadings and affidavit of the plaintiff and the affidavits and answers to the interrogatories of the defendant on material facts;

(2) The premature grant of summary judgment restricts the plaintiff in his attempts to develop theories of liability which are latent in the case;

(3) The premature grant of summary judgment prevents the plaintiff from probing the defendant's answers to interrogatories in relation to the content of affidavits submitted by the defendant, as to material facts and information which is peculiarly within the knowledge of the defendant;

(4) The district court fails to either recognize the conflicts in facts, or to explain the materiality (or lack of same) of the facts in conflict, and where the court of appeals simply affirms the district court's determination that there are no genuine issues "upon the material facts in the case," without itself examining or explaining why the facts concerning which there are conflicts are not material.

STATEMENT OF THE CASE

This is a diversity case, arising in the United States District Court for the Eastern District of Virginia (Newport News Division). Petitioner, Wendell Evans, is a resident of Pennsylvania; respondent, Newport News Shipbuilding and Drydock Company (hereinafter Newport News or respondent) is a Virginia corporation. Petitioner was employed by the McLean Contracting Company, an "independent contractor" which, although maintaining its independent corporate status, has worked closely with respondent for many years. (App. A-1, A-2)*

Petitioner worked as a skilled welder and rigger. It was while working in this capacity that he was seriously injured on July 16, 1962. He was assisting in the erection of a steel crane when the accident occurred. Apparently a six-hundred pound structural steel plate, which was being hoisted into place, broke loose, knocking petitioner from the staging platform where he was working. Petitioner and the steel plate feel together forty feet to the ground below. The steel plate landed on top of petitioner, crushing him and causing serious internal injuries and numerous broken bones. (R. Vol. I, p. 74)

Petitioner filed suit against Newport News for compensatory and punitive damages, alleging as bases for recovery: that his injuries were proximately caused by the negligence of the respondent in failing to properly supervise the work; in not enforcing safety regulations; and in not supplying proper equipment for the safe conduct of the work, all in wanton and reckless disregard for the safety of petitioner. He sought

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* References are to the certified record filed in this Court containing the original papers, interrogatories, answers, and affidavits.

damages in excess of one hundred thousand dollars, plus punitive damages and costs. Petitioner specifically denied in his complaint that respondent was either his actual or statutory employer. (R. Vol. I, p. 1)

Respondent denied negligence, interposing the defense that petitioner was engaged in work which was a part of the regular "trade, business or occupation" of respondent, that he was therefore a statutory employee of respondent and was barred by the Virginia Workmen's Compensation Act from bringing a damage action since he had received workmen's compensation benefits from the insurance carrier of the McLean Contracting Company. (R. Vol. I, pp. 7-8)

Respondent subsequently filed a motion for summary judgment (this before discovery had begun), alleging that no material issue of fact existed in the case and that the petitioner's claim was barred by Sections 65-26, 65-37 and 65-99 of the Virginia Workmen's Compensation Act. (App. D-1, D-3) Respondent supported its motion with comprehensive affidavits designed to demonstrate that the work in which petitioner was engaged was a part of the regular "trade, business or occupation" of respondent.*

Petitioner filed a counter-affidavit, detailing the events surrounding his injury. (R. Vol. I, p. 74) In this affidavit, petitioner alleged that employees of Newport News had negligently mishandled him in transporting him to the Shipyard first aid station; that after he arrived at the first aid station and after respondent's employees had begun administering first

* These affidavits were from the plant engineer for the shipyard, McLean's Superintendent at the shipyard, and the claims manager of McLean's Insurance Carrier. (R. Vol. I, p. 12; p. 18; p. 20)

aid, they stopped aiding him upon discovering that he was an employee of McLean. Respondent's employees then told petitioner that "they couldn't take care of [him] there," and he was thereupon taken to Riverside Hospital. Petitioner estimated the time lapse at "around forty-five minutes." (R. Vol. I, p. 75) Petitioner also alleged that respondent had safety regulations in force covering the work and that the equipment supplied for the work did not meet the safety specifications. Moreover, he alleged that the Newport News "safety men" should have been around supervising the work, but that there were no safety men there at the time of the accident. (R. Vol. I, pp. 76-77)

Petitioner had submitted interrogatories to respondent and additionally submitted "further interrogatories." (R. Vol. I, p. 44; p. 51) Respondent's answers to these interrogatories conflicted in several material respect with petitioner's pleading and affidavit. Specifically, respondent denied that any of its employees either transported petitioner to its first aid station, or that petitioner was given first aid; it further denied having any safety regulations in force covering petitioner's work, or that it had any supervisory personnel who were responsible for the work. With respect to the work itself, respondent's answers disclosed that most of the cranes respondent had erected in its shipyard during the period 1948-1962 were erected in conjunction with McLean; that the crane involved in petitioner's accident weighed almost twice as much as most of the cranes previously erected; and that the crane was of a type which had only been erected once prior to the date of the accident. (R. Vol. I, pp. 59-60)

After a hearing, the District Court granted respondent's motion for summary judgment, accepting

its argument that petitioner's claims were barred by the Workmen's Compensation Act. (App. A-1, A-5) Petitioner's rehearing petition was subsequently denied. (App. B-1, B-2)

On appeal, the Fourth Circuit Court of Appeals affirmed the decision *per curiam,* finding that petitioner's claims were barred by the Workmen's Compensation Act and that

> "the record discloses no genuine issues upon the material facts in the case and they bring him squarely within the Act. Hence his sole remedy is the recovery of statutory compensation." (App., C-2)

A timely petition for rehearing *en banc* was denied without opinion. (R. Vol. II, p. 29)

REASONS FOR GRANTING THE WRIT

> "The summary judgment procedure, while justified in some cases, is made a handy instrument to let judges rather than juries try lawsuits and to let those judges try cases not on evidence of witnesses subject to cross examination but on ex parte affidavits obtained by the parties." Statement of Justices Black and Douglas, to accompany transmission of amendments of rules of civil procedure to the Congress, 374 U.S. 867 (1963).

This prophetic statement has direct relevance for the instant case. Here petitioner has in fact been deprived of his truly meaningful "day in court" by virtue of the short-circuiting summary judgment procedure utilized in this case. Petitioner respectfully submits that this case could readily serve as a suitable vehicle for this Court to review the summary judgment practice of the district courts, thereby enabling it to fulfill its prime responsibility for the proper functioning of the federal

judiciary and to exercise its authority over the interpretation of important issues of federal procedure. The use of the summary judgment procedure has all too often served to provide an early burial for potentially meritorious causes; moreover, its use in the instant case

> "marks a continuation of the gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Galloway* v. *United States,* 319 U.S. 372, 397 (Black, dissenting).

a. Summary Judgment Was Inappropriate on the Question of Whether Respondent Was a Statutory Employer of Petitioner.

Petitioner has attempted to demonstrate in this case that respondent is an "other party" within the contemplation of Secton 65-38 of the Virginia Workmen's Compensation Act, and not a statutory employer under Section 65-26.* In rejecting this argument, the District Court, affirmed by the Court of Appeals, held, on the basis of the pleadings, the affidavits submitted by respondent and petitioner, and respondent's answers to interrogatories, that the welding and structural steel

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* The Virginia Workmen's Compensation Act purports to bar all claims by employees against either actual or statutory employers for actions arising out of working conditions, where the employer and employee have accepted the benefits and burdens of the Act. The fiction of "statutory employer" was created by statute to protect prime contractors from suits by employees of their subcontractors. If an injury occurs to an employee while his employer is doing the "trade, business or occupation" of the prime contractor, the employee has a right under Section 65-26 of the Act to recover workmen's compensation from the prime contractor (statutory employer). Under Section 65-38, a right of action against "other parties" is recognized so that if an injury occurs to an employee as a result of the negligence of an "other party," the employee may sue such other party on the basis of a common law action.

work performed by McLean was a part of the regular "trade, business or occupation" of respondent and that it was therefore petitioner's statutory employer.

Summary judgment was inappropriate on this point because petitioner had elicited information fom respondent's personnel through interrogatories which strongly suggested that the welding and structural steel erection of the crane involved in this case was not in fact a part of the regular "trade, business or occupation" of respondent. Specifically, respondent's answers to these interrogatories demonstrated that the crane petitioner was working on was a "whirler" type crane weighing 110 tons and that only one of the cranes erected in the shipyard during the period 1948-1962 was a whirler crane (this erected in 1962) and that this crane weighed only 60 tons. (R. Vol. I, pp. 59-60) The answers further demonstrated that respondent had never erected a whirler crane without McLean's assistance and that the 110 ton crane here concerned was the largest crane ever erected in the shipyard. Moreover, the interrogatories in question here were answered by a certain W. F. Metts, Assistant to the Personnel Manager, while the affidavit accompanying respondent's motion for summary judgment addressed to this point was signed by the plant engineer, one John W. Irvine. Petitioner attempted to test the truth of Mett's answers and prove them by noticing his deposition on April 6, 1965, which petitioner had a right to do under the terms of the Pre-Trial order in this case (R. Vol. I, pp. 54-55), which granted petitioner until July 5, 1965 to complete discovery. However, the hearing on respondent's motion for summary judgment was held on April 9, 1965 and it was subsequently granted, thereby precluding petitioner from

probing Mett's answers. The District Court's grant of summary judgment was *premature.* Petitioner should have been afforded an opportunity to test these answers and attempt further discovery as to whether McLean's work was in fact a part of the "trade, business or occupation" of respondent. This is especially true in view of the rule recognized in the Fourth Circuit that, if there is evidence which a jury could accept which would show that the work is not part of the "trade, business or occupation" of an employer, the case must go to the jury. *American Export Lines, Inc.* v. *Revel,* 266 F. 2d 82 (C.A. 4th, 1959).

b. Summary Judgment Is Inappropriate Where There Is Genuine Issue Between the Parties as to Material Facts, Especially Where the Resolution of the Dispute Is Important to the Development of a Theory of Liability of the Non-Moving Party.

Petitioner argued to both the District Court and the Court of Appeals that, even if respondent is deemed to be a "statutory employer" by virtue of the fact that the work here in question was a part of its regular "trade, business or occupation," it should nonetheless be *estopped* to plead the Virginia Workmen's Compensation Act in bar to petitioner's common law action for damages. This argument is based upon the fact that, through the words and actions of its employees, respondent *rejected* the employment relationship with petitioner, and failed to perform a duty which it owed to petitioner under the Act. Under Section 65-85 of the Virginia Code, an employer is required to provide an injured employee with medical aid. Respondent both failed and refused to provide petitioner with such aid; moreover, it compounded the harm done petitioner in that its personnel actually began treating him but

then failed and refused to continue such treatment. Petitioner argued that respondent should not be allowed to reap a benefit provided by the Act (by virtue of the statutory employer fiction), when it had failed and refused to assume any *burdens* imposed by the same Act.

Although this issue was clearly posed for the District Court's determination (R. Vol. I, pp. 128-134), it did not even pass upon it. The same argument was presented to the Court of Appeals; its brief opinion in no way alludes to or settles this question. Certainly it is no answer to this argument that the Compensation Act bars petitioner's suit. Such an answer begs the question mercilessly. Apparently both the District Court and Court of Appeals assumed that this issue could be answered by simply invoking the magic summary judgment rubric to the effect that "there are no genuine issues on any material facts."

Moreover, neither Court came to grips with the fundamental conflict existing on the question of whether petitioner was mishandled by respondent's personnel. Petitioner's affidavit clearly and unequivocally states that respondent's employees mishandled him in transporting him to the first aid station, began giving him first aid, and then refused to continue when they found out he was an employee of McLean. (R. Vol. I, pp. 74-75) Respondent's answer to petitioner's interrogatory on this point was that *none of its employees rendered first aid or otherwise attempted to aid petitioner after his fall.* (R. Vol. I, p. 58) This conflict clearly presents a material issue of fact in this case which cannot be settled by a judge by way of summary judgment. "On a motion for summary judgment, the court cannot try issues of fact. It can

only determine whether there are issues to be tried." Wright, *Federal Courts,* § 99, p. 386. Even if the lower courts did not think respondent's conduct in this case outrageous enough to invoke the estoppel argument on the record as it stood, in view of the direct and material conflict between the parties, petitioner should have been allowed an opportunity to prove or disprove the truth of respondent's denial so that petitioner's estoppel argument could have been given full ventilation. This is especially true where, as here, the knowledge necessary to resolve the dispute is "peculiarly within the knowledge of the moving party." *Id.* at 387.

c. Summary Judgment Is Inappropriate Since There Are Genuine Issues on Material Facts With Respect to Whether Respondent Failed to Have Safety Regulations in Force, or Whether It Failed to Enforce Those Safety Regulations It Had in Force, or Whether Respondent Failed to Provide Petitioner With a Safe Place to Work.

Petitioner, in his affidavit, (R. Vol. I, pp. 76-78) alleged that respondent maintained a safety program with respect to the work McLean was performing for Newport News. He also alleged that respondent's safety personnel should have been supervising the job in question, that they in fact were not, and that respondent provided him with unsafe equipment for the job he was performing. In its answers to petitioner's interrogatories, respondent stated that although it maintained a safety program generally for its own personnel, "it maintained no program dealing with safety, accident prevention or first aid emergency treatment, with regard to the accident which is the subject of this suit." (R. Vol. I, p. 58) Its answers also disclosed that it had no personnel responsible for the supervision of the erection work petitioner was performing; nor did it have any safety personnel assigned

to cover the area of the shipyard in which the accident took place. (R. Vol. I, p. 58)

Clearly there is a conflict between petitioner and respondent on these safety questions. It is difficult to see how these are not "genuine issues on material facts" in this case. Respondent's response below on this point was that, even if true, this is all irrelevant, because it would only tend to demonstrate negligence on the part of respondent and any claim for negligence is barred by the exclusive remedy provision of the Workmen's Compensation Act. Apparently the District Court agreed with respondent's contentions on this matter (App. B-1, B-2); the Court of Appeals failed to comment one way or the other, apparently agreeing with the District Court.

Once again, petitioner submits, the respondent and the courts below have begged the question and have utilized the Workmen's Compensation Act as the illogical answer to petitioner's contentions. In the first place, petitioner's arguments in this regard are directly relevant to its estoppel argument, which, if decided in favor of petitioner, removes the bar of the Act. Clearly the fact that respondent has demonstrated a complete disregard for the safety of its purported statutory employee would be relevant as to whether it should be estopped to plead the Act in defense to petitioner's claims. Moreover, it seems anomalous in the extreme that respondent could act so capriciously towards petitioner, demonstrating a complete disregard for his safety, but at the same time be insulated against its own nonfeasence towards its "employee" by virtue of the "statutory employer" fiction. In addition, a juxtaposition of these answers with those previously noted (*supra,* 5) with respect to the type crane

involved demonstrates that defendant failed to maintain either a safety program or safety personnel to supervise this activity, even though the crane involved was bigger than any crane ever before erected in the shipyard, and only one other crane of this type had been erected before, that crane weighing a little more than one half the crane here in question.

Petitioner also advanced the theory that, given respondent's wanton and reckless misconduct toward him, he should be able to maintain a suit for punitive damages even if respondent is deemed to be petitioner's "statutory employer." The District Court rejected petitioner's theory (App. A-3-A-5); the Court of Appeals failed to pass upon the issue. Again, this issue cannot simply be subsumed under the summary judgment rubric. If respondent has acted in the manner alleged by petitioner—and, for the purposes of deciding a motion for summary judgment, petitioner's allegations must be accepted as true—then there is serious question as to whether respondent's actions should give rise to punitive damages without regard to whether the petitioner has either recovered workmen's compensation, or whether he could recover compensatory damages.

d. Applicable Legal Principles and Conclusion

The general rule which must guide the District Court in disposing of motions for summary judgment is that the moving party has the burden of showing the absence of any genuine issues as to all the material facts applicable under his theory of law. *Evers* v. *Buxbaum,* 253 F. 2d 356 (C.A.D.C., 1958). Moreover,

> "one who moves for summary judgment has the burden of demonstrating clearly the absence of

> any genuine issue of fact, and that any doubt as to the existence of such an issue is resolved against the movant. The courts are quite critical of the papers presented by the moving party, but not of the opposing papers." *Hoffman* v. *Partridge,* 172 F. 2d 275, 276 (C.A.D.C., 1949); *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620 (1944); *Kress* v. *Downing,* 286 F. 2d 212 (C.A. 3rd, 1960). See 6 Moore's Fed. Prac. (2d Ed.), pp. 2123, 2124, 2125-26.

It is submitted that respondent did not meet this burden and that the District Court, affirmed by the Court of Appeals, erred in granting the motion for summary judgment. Further, it is apparent from the treatment accorded this issue by the lower courts that petitioner did not receive the benefit of this Court's mandate in *United States* v. *Diebold, Inc.,* 269 U.S. 654 (1962) that "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion."

Both lower courts in this case have failed to look beyond the narrow boundaries of the Virginia Workmen's Compensation Act in deciding the questions posed for their consideration. In so doing, the courts have improperly utilized the summary judgment procedure and unduly attenuated petitioner's efforts to develop his various theories of liability.

Finally, both the District Court and the Court of Appeals have failed to articulate the bases underlying the granting of summary judgment. Nowhere do either of the courts come to grips with the "genuine issues of material facts" presented in the case; nowhere do the courts either recognize the conflicts in facts, or explain the materiality or lack of same of the facts

in conflict. The summary and conclusory handling of this question by lower federal courts makes effective review by appellate courts and this Court difficult in the extreme. Petitioner respectfully requests that this Court grant this petition in order that it might review the propriety of this practice; juries, not judges, should try and determine material disputed issues of fact. The matters in issue in this case require and should receive a jury tral. *Byrd* v. *Blue Ridge Electric Corp.*, 356 U.S. 525 (1958). See also *Magenau* v. *Aetna Freight Lines*, 360 U.S. 273 (1959).

Respectfully submitted,

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